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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of

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Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-265
Development of Competition and Diversity in Video Programming Distribution and Carriage	)	

REPLY OF LANDMARK COMMUNICATIONS, INC. TO OPPOSITIONS

Landmark Communications, Inc. ("Landmark") hereby submits its Reply to Oppositions in the above-captioned proceeding.[1]

I. INTRODUCTION

Landmark urges the Commission to:

- Adopt the Wiggem proposal to exempt from the program

- Amend its definition of "competing distributor" to require substantial overlap of actual or proposed service areas.

II. THE COMMISSION SHOULD EXEMPT FROM THE PROGRAM ACCESS RULES ANY PROGRAM SERVICE WHOSE COMMONLY OWNED CABLE SYSTEMS ACCOUNT FOR LESS THAN FIVE PERCENT OF THE SUBSCRIBERS TO THAT PROGRAM SERVICE

In the Program Access Order, the Commission declined to

> profitably in anticompetitive behavior in dealing with alternative distributors.[6]

In fact, the Crandall Study finds that "cable ownership far in excess of that contemplated by Viacom's proposal is needed to make discrimination profitable...."[7] Moreover, the Study notes that failure to establish a de minimis exemption will create disincentives for relatively small companies to produce cable programming, contrary to the Act and antitrust policy.[8]

Landmark supports the findings of the Crandall Study and urges the Commission to adopt the Study's recommended de minimis exemption. The program access rules were designed to reach program services with sufficient size and scope to significantly harm competition. Program services lacking such size and scope, by definition, cannot have that impact on the marketplace.[9]

In its Comments, Landmark pointed out that it could not survive as a programmer by serving only, or even principally, its attributed TeleCable cable systems. Rather, Landmark must look to unaffiliated distributors for the overwhelming majority of subscriptions to The Weather Channel and the Travel Channel.[10] For example, The Weather Channel serves over 53 million cable subscribers and over 1.2 million HSD, MMDS, and SMATV subscribers for a total subscribership of 54.2 million. However, only

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[6] Crandall Study at 1. See also id. at 7.

685,000 of these 54.2 million subscribers receive The Weather

Commission should look to the "substantial data" and well-supported findings of the Crandall Study and exempt from the rules any program service whose commonly owned cable systems provide less than five percent of the service's total subscribers.

III. A DAMAGES REMEDY FOR PROGRAM ACCESS VIOLATIONS CANNOT BE SUPPORTED ON EITHER STATUTORY OR POLICY GROUNDS

Landmark joins commenters opposing NRTC's request that the Commission reserve the right to award damages in program access cases.[11] In the Order, the Commission correctly concluded that the 1992 Cable Act does not grant "authority to assess damages

are not included in Section 628(e), the Commission was correct in excluding damages as an available remedy.

A damages remedy also would be inconsistent with clear Supreme Court precedent that "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."[13] The Commission correctly found in the Notice in this proceeding that the Act and its legislative history are silent concerning application of the program access rules to existing contracts.[14] Thus, because the Act does not even intimate, let alone "require" retroactive application, the Commission may not apply the rules retroactively to impose damages on programmers.

NRTC bases its position entirely on provisions of the Communications Act which provide damages in certain circumstances for common carriers.[15] However, the Act also clearly states that cable operators are not subject to regulation as common carriers.[16] Plainly, remedies in the Communications Act that are

impunity"[17] ignores the substantial remedies already contained in Section 628(e). Not only may the Commission "establish prices,

to compete in the marketplace.[21] Landmark supports this solution on an eminently reasonable compromise. Not only will such a

nor the ability to engage in anticompetitive conduct in particular markets in which it is not vertically integrated:

> We agree with the majority of commenters who argue that cable operators have no incentive to favor programming services that are affiliated with a rival MSO. Moreover, there is no opportunity for a vertically integrated cable operator to control the content or distribution of a programming service in which it has no ownership interest. We also agree with commenters who note that application of the channel occupancy limits to all vertically integrated programmers, regardless of whether they are affiliated with the particular cable operator, would severely inhibit MSO investment in programming services, since the mere fact of such MSO investment would restrict carriage of the programming service on all cable systems.[25]

Because discrimination resulting from vertical integration is the only practice with which Congress was concerned (as demonstrated by the fact that Congress chose not to apply the program access rules to non-vertically integrated programmers), the Commission should heed its own findings in its ownership proceeding and limit application of the program access rules to areas in which anticompetitive practices could occur.

VI. THE COMMISSION SHOULD ADOPT A MORE STRINGENT DEFINITION OF "COMPETING DISTRIBUTOR"

Under the rules, a distributor may bring a program access complaint if there is "some overlap in actual or proposed service area" with a competing distributor.[26] Landmark believes such a definition of "competing distributor" is vague and unjustifiably lenient. The area covered by competing distributors rarely will overlap precisely. Thus, because the Commission has given no

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[25] Id. at ¶ 181 (first and second emphases added; third emphasis in original).

[26] Order at ¶ 96.

guidance on how much overlap is necessary to satisfy the requirement of "some" overlap, there will be confusion in many cases. Moreover, the current definition of "competing distributor" may encourage complaints where distributors have

CERTIFICATE OF SERVICE

I, Francis M. Buono, do hereby certify that I have this 26th day of July, 1993, caused a copy of the foregoing "Reply of Landmark Communications, Inc. To Oppositions" to be served by first-class mail on the following:

Jane R. Cottrell
Mark Melnick
Group W Satellite Communications
250 Harbor Drive
Stamford, CT 06904

Gary M. Epstein
James H. Barker
Latham & Watkins
1001 Pennsylvania Avenue, N.W.
Suite 1300
Washington, D.C. 20004

Michael E. Glover
1710 H Street, N.W.
Washington, D.C. 20006

Kenneth E. Hall
General Manager
WJB-TV Ft. Pierce Lim. Partnership
8423 US #1
Port St. Lucie, FL 34985

G. Todd Hardy
Mark C. Ellison
Hardy & Ellison, P.C.
9306 Old Keene Mill Road
Suite 100
Burke, VA 22015

Stephen A. Hildebrandt
Westinghouse Broadcasting Company
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036

James R. Hobson
Jeffrey O. Moreno
Donelan, Cleary, Wood & Maser, P.C.
1275 K Street, N.W., Suite 850
Washington, D.C. 20005-4078

Robert L. Hoegle
Timothy J. Fitzgibbon
Carter, Ledyard & Milburn
1350 I Street, N.W.
Suite 870
Washington, D.C. 20005

David Honig
1800 N.W. 187th Street
Miami, Florida 33056

Ward W. Wueste, Jr., HQE03J43
Marceil F. Morrell, HQE03J35
GTE Service Corporation
P.O. Box 152092
Irving, Texas 75015-2092

Robert D. Joffe
Cravath, Swaine & Moore
Worldwide Plaza
825 Eighth Avenue
New York, New York 10019

Kenneth R. Logan
Peter C. Thomas
Edward D. Johnson
Simpson Thacher & Bartlett
425 Lexington Avenue
New York, New York 10017

Judith A. McHale
Barbara S. Wellbery
Discovery Communications, Inc.
7700 Wisconsin Avenue
Bethesda, MD 20814

John B. Richards
Keller and Heckman
1001 G Street, N.W.
Suite 500 West
Washington, D.C. 20001

Henry M. Rivera
Larry S. Solomon
Ginsburg, Feldman and Bress,
Chartered
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

Marvin Rosenberg
Patricia A. Mahoney
Fletcher, Heald & Hildreth
1300 N. 17th Street, 11th Floor
Arlington, VA 22209

John D. Seiver
David M. Silverman
John Davidson Thomas
Cole, Raywid & Braverman
1919 Pennsylvania Avenue, N.W.
Suite 200
Washington, D.C. 20006

Paul J. Sinderbrand
Dawn G. Alexander
Sinderbrand & Alexander
888 Sixteenth Street, N.W.
Suite 610
Washington, D.C. 20006-4103

Jeff Treeman
President
United Video, Inc.
3801 S. Sheridan Road
Tulsa, OK 74145

Richard E. Wiley
Lawrence W. Secrest, III
Philip V. Permut
Wayne D. Johnsen
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

Francis M. Buono